In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1234

MANUEL GLENN ABASCAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he should have been warned before being held in contempt, that this conduct was not contemptuous, and that the use of summary contempt was inappropriate.

1. By an indictment returned in the United States District Court for the Southern District of California, petitioner and eight others were charged, in various combinations, with conspiracy to import and possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841, 846, 952, 960, and 963. On June 20, 1974, petitioner and his counsel came to the courthouse to examine records in connection with a motion on petitioner's behalf. While his attorney was examining the records in the clerk's office, petitioner attended a hearing on a motion filed by one of his co-defendants. Petitioner was not a party to the hearing, and his presence was not required.

When the court recessed at about 10:45 a.m. and the clerk ordered everyone to rise, petitioner remained seated. Noting petitioner's presence and failure to rise, the presiding judge had his secretary prepare a statement, which the judge intended to read to petitioner (T. 3).[1]

Petitioner was not present when the court reconvened at about 11:00 a.m., but he subsequently entered the courtroom. At the noon recess, as the judge stood to leave the bench, the clerk ordered everyone to rise. After the judge paused to answer a question by counsel for petitioner's co-defendant, the clerk again ordered everyone to rise. All except petitioner rose (T. 3-4). The following colloquy then occurred (Pet. App. A, p. A-2; T. 4):

THE COURT:	Mr. Abascal, would you step forward, please?
DEFENDANT ABASCAL:	(No response).
THE COURT:	Step forward, please.
DEFENDANT ABASCAL:	Not without my counsel, sir.

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[1]The statement read (T. 5):

> Mr. Abascal, it concerns me not whether you have any respect for me personally. However, I do demand respect for this Court. I suggest that if you entertain any thoughts of becoming an attorney, you conduct yourself accordingly while in the courtroom. This includes standing during the opening and closing of each Court session. Your continued failure to do so will result in this Court's order that except during the hearings involving yourself, you will absent yourself from the Courtroom along with such other sanctions as this Court shall impose on you.

"T." refers to the reporter's partial transcript of the proceedings on June 20, 1974.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail.

Petitioner was then taken into custody.

A few hours later petitioner and his counsel appeared before the court. The judge stated that he had asked petitioner to step forward in order to read a statement to him (T. 4-5). Before he imposed sentence, the judge allowed petitioner to speak on his own behalf. Petitioner stated (T. 9):

> I'd like to address the Court and state that, as an institution, I meant no disrespect to the Court and that I required or requested for my fundamental legal right that my counsel be present before I be brought up in front of the Court.

The court then sentenced petitioner to imprisonment for 90 days and denied his motions for a stay pending appeal and for release on bail (T. 10-12).

On June 24, 1974, the court filed a Certificate of Contempt in which it characterized petitioner's refusal to step forward as insolent and ruled that petitioner's conduct was a direct affront to the dignity of the court, in violation of 18 U.S.C. 401. The certificate stated: "[I]f this court cannot require those who are in its courtroom to obey the court, then this court would lose any control it has over its own court and courtroom" (Pet. App. A, p. A-1).

On July 1, 1974, the court of appeals granted petitioner's application for bail. On January 9, 1975, it affirmed petitioner's conviction but vacated (as excessive) the remainder of his sentence (Pet. App. B; 509 F.2d 752).

2. Petitioner contends that, because the district court should not have summarily held him in contempt, his conviction should have been reversed (Pet. 22-23). The court of appeals agreed with petitioner's argument that his actions were punishable, if at all, only under the notice and hearing provision of Fed. R. Crim. P. 42(b) rather than the summary contempt procedures of Rule 42(a) (Pet. App. B, pp. A-11 to A-13). Instead of reversing his conviction and remanding for a new hearing, however, the court of appeals simply vacated the remainder of his sentence (Pet. App. B, pp. A-12 to A-13). Petitioner contends that this was improper and that, once the court of appeals concluded that his conviction was erroneous, it had no alternative but to reverse.

However, the court of appeals' conclusion about Rule 42(b) was incorrect, and petitioner's contention thus fails. Petitioner's conduct, if contemptuous, fell squarely within the terms of Rule 42(a) because it was committed "in the actual presence of the court." As this Court has recently held in *United States* v. *Wilson*, No. 73-1162, decided May 19, 1975, a contempt committed in the physical presence of the court may be punished summarily in accordance with the terms of Rule 42(a). We submit that *Wilson* is dispositive of this portion of petitioner's argument, and that his conviction was not defective because imposed pursuant to Rule 42(a).

3. Petitioner argues that it was improper to hold him in contempt because less severe alternatives, including a warning, should have been employed by the district court, because his failure to rise and step forward did not interrupt an ongoing judicial proceeding but occurred during a recess, and because, although his failure to rise and step forward may have been an affront to the dignity of the judge, it was not an obstruction of the

judicial process. We recognize that the cumulation of these contentions, although not necessarily any one of them singly, raises questions about the propriety of petitioner's citation for contempt.[2]

On several occasions this Court has held that the contempt power should be exercised sparingly and only as a last resort. "Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes." *Sacher* v. *United States*, 343 U.S. 1, 8; cf. *Bitter* v. *United States*, 389 U.S. 15, 16. This theme was reiterated in *Wilson*: "[O]nly 'the least possible power adequate to the end proposed' should be used in contempt cases" (slip op. at 10, quoting from *Anderson* v. *Dunn*, 6 Wheat. 204, 231).

We do not doubt that there are many cases in which a face-to-face refusal to comply with a court's order to step forward will disrupt or frustrate an ongoing proceeding. So, too, we think it clear that in many cases of that sort an immediate citation for contempt would be entirely appropriate. The propriety of its use in this case, however, is uncertain. Petitioner explained, when he was brought before the court after he had been held in con-

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[2]Citing *United States* v. *Snider*, 502 F.2d 645 (C.A. 4), and *In re Dellinger*, 461 F.2d 389 (C.A. 7), petitioner contends that this Court should resolve the conflict among the circuits concerning the authority of a trial judge to punish a defendant's failure to rise at the opening and closing of a session of court. It is unnecessary to resolve that conflict in this case; petitioner was cited not only for his refusal to rise ceremonially, but also for his refusal to step forward to be addressed by the judge, a refusal that, ironically, prevented the judge from reading to him the full warning that had been prepared. Neither *Snider* nor *Dellinger* involved such additional circumstance.

tempt, that he declined to step forward because he was without his attorney, and that he meant no disrespect for the court. This is not, of course, a legitimate reason for failing to obey the court's order, nor does petitioner now contend that it was. But it may suggest that, if the district court had warned petitioner that the court considered his refusal to step forward contemptuous and informed him that he was not entitled to seek the advice of counsel before complying, there was some possibility that petitioner would have obeyed, and the need for his incarceration could have been averted.

4. We submit that it is unnecessary, however, for this Court to decide whether the contempt citation in this case was proper. As a result of the decision of the court of appeals, petitioner already has served all of his sentence. This Court has held (*St. Pierre* v. *United States*, 319 U.S. 41) that a case becomes moot when a contemnor completes his sentence. Since *St. Pierre* was decided, its scope has been narrowed by *Sibron* v. *New York*, 392 U.S. 40. *Sibron* held that, in the event of a conviction for a felony, a case is not moot unless the government can establish that there is "no possibility" that any collateral consequences "will be imposed on the basis of the challenged conviction" (392 U.S. at 57).

In the instant case, although we cannot say with absolute certainty that no collateral consequences attend petitioner's citation for contempt, we submit that there is no reasonable possibility of collateral consequences. Contempt is not a "felony," and laws imposing civil disabilities upon felons (as was the case in *Sibron*) rarely, if ever, impose such disabilities upon contemnors. More-

over, petitioner now has been convicted of the drug offenses and sentenced to a term of nine years' imprisonment. In light of this sentence, adverse collateral consequences will obtain whether or not petitioner's citation for contempt stands, and we know of no collateral consequence that will be created or augmented by the citation.[3] Under these circumstances, we submit, this case is moot, and certiorari should be denied for that reason.

5. Even if the case were not regarded as moot, we believe there is little to be gained by review by this Court. This case, like most contempt cases, turns on its particular (and somewhat unusual) facts. Plenary review by this Court would likely be of little value in elucidating the applicable legal principles, particularly in light of their recent reiteration by this Court in *Wilson*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[3]Petitioner's conviction is now on appeal to the Court of Appeals for the Ninth Circuit. We do not believe that it is likely to be reversed; if it is reversed, and if, thereafter, collateral consequences are imposed upon petitioner solely as a result of the citation for contempt, petitioner could seek a writ in the nature of *coram nobis*. If the present petition is denied on mootness grounds, we would consent to the disposition of such an application on its merits and would not argue preclusion by virtue of the previous litigation of the same issue.